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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2002-CA-000332-MR

NORMAN KENNEDY — APPELLANT

v.

APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 01-CR-00013

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE. Norman Kennedy appeals from a judgment of the Trigg Circuit Court convicting him of assault in the first degree but mentally ill and sentencing him to fourteen-years' imprisonment. Kennedy argues that he was deprived of a fair trial because of comments by the Commonwealth concerning his silence after having been advised of his right to remain silent. He also contends that the evidence established that he was not

guilty by virtue of insanity and that, therefore, the trial court erred in failing to direct a verdict of acquittal.

Because neither alleged error was preserved for appellate review, Kennedy asks that we consider his arguments pursuant to RCr[1] 10.26. After a review of the record, we are unable to conclude that the trial court erred in failing to direct a verdict of acquittal. Particularly disturbing were the prosecutor's references to Kennedy's silence after his receipt of his Miranda[2] warnings. We are asked to determine whether those undoubtedly improper references were sufficiently prejudicial to warrant a new trial. While we believe that the prosecutor erred in his commentary, we have determined that the error was harmless under the circumstances of this case.

The events leading to Kennedy's conviction occurred in the early morning hours of May 30, 2000. At about 3:00 a.m., June Carr was awakened by noises outside her window. Believing that teenagers were vandalizing mailboxes along the road, Carr went outside and fired her .20 gauge shotgun into the air. However, Carr's sleep had not been disrupted by adolescents as she had suspected but rather by the appellant, Kennedy. Armed with a shotgun loaded with bird shot and carrying pruning shears, Kennedy was wandering throughout the neighborhood cutting wires to television antennas and telephones. The

[1] Kentucky Rules of Criminal Procedure.
[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

appellant, who was fifty-one years of age at the time of his trial, testified as follows:

> Over a period of time I've been experiencing voices in the form of my TV talking to me, animals around the area speaking to me in different forms. And it seemed like a half an hour before I left the trailer and went down the road that it all came to occurrence. In other words, things were out of control. For example, one of the spirits that – that entered me at the particular time – if you've ever seen the movie with Whoopie Goldberg where she's sitting there doing this psych thing with these people, and all of a sudden this gentleman jumps inside her, that's exactly what it felt like. . . . A half hour before I left something entered in me that, like, took control of me, and my thoughts, and the way I was thinking, and caused me to think of, "Okay, if I go down the road and cut the wires to these TV's, then the voices that were coming through their TV's that were controlling me would stop."

Kennedy severed the lines to several telephones and television antennas, including the line to Carr's telephone. By the time that Carr awoke and went outside, Kennedy had moved on to another nearby residence. He testified that he heard Carr's shot and saw her standing in the middle of the road. Although he and Carr had never quarreled in the past, he told the jury that he believed that Carr was capable of being violent and that she was trying to kill him. Therefore, he instinctively fired his own weapon in her direction in self-defense. Additionally, he stated that because he did not want to hurt Carr, he

purposefully pulled the gun to the right to avoid hitting her. Nevertheless, Carr was wounded, and she spent several days in the hospital recuperating from the gunshot wounds. Kennedy stipulated to the serious nature of Carr's physical injuries at trial.

After shooting Carr, Kennedy returned to his home, where he was arrested later that morning. When officers arrived, Kennedy refused to allow them to search his premises before securing a warrant. Detective Kevin Pelphrey testified that after Kennedy was informed of his Miranda rights, he told the officers that he was not going to make a statement and that he did not want to talk to them. A warrant was then obtained, and a search of Kennedy's home uncovered several weapons and numerous marijuana plants.[3]

After his arrest, Kennedy was referred to the Kentucky Correctional Psychiatric Center (KCPC) for evaluation. Initially, it determined that Kennedy was not competent to participate in his own defense. However, after several months of treatment, Kennedy was well enough to stand trial. The Commonwealth presented Dr. Steven Simon, the only expert witness at trial, who was the psychologist who evaluated Kennedy at KCPC. He testified that Kennedy had admitted to shooting Carr. On cross-examination, Dr. Simon stated that Kennedy suffered

[3] Separate charges connected to the seizure of the marijuana were severed from the assault charge prior to trial and are not relevant to this appeal.

from a schizo-affective disorder, bipolar in nature, and that in his opinion, Kennedy had been insane at the time of the shooting. Specifically, Dr. Simon testified as follows:

> [Kennedy] believed that he was underseized by demons and that they were attacking him. He feels one entered his body, he was hallucinating, he was hearing voices, and delusional, which refers to false beliefs, he was not in contact with reality during these experiences with these symptoms. . . . I believe he was in the state of acute – an acute manic episode with psychotic – psychotic symptoms.

At the conclusion of the Commonwealth's case, the trial court denied Kennedy's motion for a directed verdict. The motion was not renewed at the conclusion of the trial. The jury was instructed that it could find Kennedy guilty of first-degree assault, second-degree assault, or fourth-degree assault. The jury was also given instructions covering the concept of guilty but mentally ill; it was also instructed as to Kennedy's defenses of insanity and self-defense.

In his closing argument, the prosecutor urged the jury to reject Kennedy's insanity defense. He posed a series of rhetorical questions concerning the behavior of an allegedly insane person. Among the many queries he asked the jury to ponder was an allusion to Kennedy's astuteness in invoking his right to silence. He intimated that the silence was indicative

of Kennedy's rational state of mind -- therefore refuting his insanity defense:

> The bottom line is, June Carr was shot on May 30th. And she was shot by this defendant who was out that night cutting wires, or that morning cutting wires, based upon what he said were people talking to him. That's something you're going to have to decide. Is that true or is that fiction? I don't know. I can tell you the evidence would suggest that it's fiction, made up, a red herring, a smoke screen, to try to lessen the impact of what he actually did that night in shooting June Carr.
>
> He tells you yesterday, from the stand, that these voices told him to do that. But what is very, very clear, he had decided to go home, he was going to before this shooting happened. He was under his own control. He made a conscious decision to shoot this woman, because he said so from the stand. "I thought somebody was trying to kill me." Preposterous. No one pointed a gun at him and shot. First degree pure and simple.
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> . . .
>
> We've heard discussions about whether or not he's insane. We're talking about criminal responsibility here. We're not talking about what a doctor says. The doctor may have concluded that he's mentally insane, but we're talking about criminal responsibility. We're talking about legal responsibility. We're talking about does the evidence suggest he's legally insane, and it does not.
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> . . .
>
> Is he insane? Does a person that's insane flee the scene after he shoots somebody and tells you, "I didn't mean to

> cause her any harm or injury"? Does an insane person do that? Of course not. Does an insane person go back to his house and hide until the law arrives? Does an insane person invoke his rights after being read his rights? Does an insane person hide evidence or fail to turn over evidence if he was so innocent, if he didn't mean her no harm? Of course not.
>
> He fled, he invoked his rights, he refused to turn over evidence to the law. All that suggests that he knew exactly what he was doing. He knew he was wrong, he knew he was caught, and he was trying to keep the officers from finding this evidence. He's not insane. He's not insane. He may be mentally ill, and you can find that, but he's criminally responsible. A person who's mentally ill can still be criminally responsible for their actions. And Norman Kennedy, under the evidence, should be held responsible for his actions. (Emphases added.)

The jury found Kennedy guilty of first-degree assault but mentally ill. On January 9, 2002, the trial court entered a final judgment sentencing Kennedy to serve fourteen years in prison. This appeal followed.

Kennedy argues that the evidence was uncontradicted that he was insane at the time he shot Carr and that, therefore, he was entitled to a directed verdict of acquittal. Acknowledging that this issue was not properly preserved for review, he seeks relief pursuant to RCr 10.26, the palpable error rule. We agree that this issue is critical enough to merit our review under RCr 10.26.

Our review of the evidence presented at trial reveals that this was a close case. Nevertheless, we conclude that the trial court did not err in submitting the issue of Kennedy's sanity to the jury and in not granting his motion for a directed verdict. In order to establish the defense of insanity, a defendant must prove that at the time of the offense, he was "unable to appreciate the wrongfulness of his conduct or to resist his impulse to commit the illegal deed." Edwards v. Commonwealth, Ky., 554 S.W.2d 380, 383 (1977). KRS[4] 504.020(1) provides as follows:

> A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or mental retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The jury rejected Kennedy's insanity defense. Therefore, we must determine whether under the evidence as a whole, "it would be clearly unreasonable for [the] jury to find against [Kennedy] on the issue of insanity." Port v. Commonwealth, Ky., 906 S.W.2d 327, 330 (1995); see also, Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984); and, Wiseman v. Commonwealth, Ky., 587 S.W.2d 235 (1979).

Kennedy relies on the testimony of the Commonwealth's expert, Dr. Simon, as providing conclusive evidence of his

[4] Kentucky Revised Statutes.

mental state. However, the opinions of experts are not binding on the jury. Wiseman, supra, at 237; Tunget v. Commonwealth, 308 Ky. 834, 198 S.W.2d 785 (1947). Rather, the Kentucky Supreme Court has long held that:

> a motion for a directed verdict in a case involving an insanity defense would be defeated as long as there was "some evidence" indicating that the defendant was sane at the time of the commission of the crime.

Brown v. Commonwealth, Ky., 934 S.W.2d 242, 246 (1996). Viewing the evidence in a light most favorable to the Commonwealth, we conclude that the jury could have reasonably rejected Kennedy's insanity defense and that it could have reached the verdict that Kennedy was guilty but mentally ill. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

In this case, the expert evidence revealed that Kennedy was delusional. However, the jury also heard evidence -- mostly from Kennedy himself -- to support its finding that Kennedy was capable of controlling his actions when he shot Carr. Specifically, the jury heard Kennedy's testimony that he shot Carr in self-defense and that he deliberately pulled his weapon aside in order to avoid hitting her. Thus, although Dr. Simon had opined that Kennedy was insane, the jury could have reasonably believed that his delusional state had abated by the time that he shot Carr.

Next, Kennedy argues that he was deprived of a fair trial by the prosecutor's comments concerning his refusal to make any statements to police officers after having been informed of his rights. He cites the U.S. Supreme Court's ruling in both Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), for the proposition that the prosecutor committed reversible error in commenting on his silence in order to impugn his claim that he was insane at the time of the offense (*i.e.*, that he was rational and cunning enough to know when to hush). This is a serious allegation of error (albeit unpreserved) meriting a careful analysis.

In Doyle, supra, the Court held that the state may not:

> seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest.

426 U.S. at 611. The Supreme Court ruled that use of a defendant's post-*Miranda* silence would be "fundamentally unfair" and a violative of the Due Process Clause of the 14th Amendment. Id. 426 U.S. at 618.

In Wainwright, supra, the Court directly addressed the propriety of using a defendant's post-*Miranda* silence and his

invocation of Fifth Amendment right to remain silent in order to overcome an insanity defense. 474 U.S. at 626. As in the case before us, the prosecuting attorney in Wainwright alluded to the defendant's post-*Miranda* refusal to talk to officers and to his request for an attorney as clear evidence that the defendant was sane. The Court held as follows:

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situation. (Emphases added.)

Wainwright, 474 U.S. 284, 292.

The Commonwealth is correct in arguing that Kennedy's attorney failed to object to the comments and that the issue was not preserved for appellate review. We can only speculate as to the reason for that failure to object. It is noteworthy that the comments were brief and that they were not isolated for emphasis. Rather, they occurred as part of a long series of conjectures surrounding the issue of Kennedy's sanity. It is

apparent that they did not leap forward from the over-all context of the argument in such an egregious fashion as to alert defense counsel of the need to object.

When viewed in the midst of the ongoing questions among which the comments on silence were rather unobtrusively interspersed, they do not rise to the level of reversible error. However, it would undoubtedly have been the preferred practice that they had not occurred at all. Therefore, we are not persuaded that Kennedy was entitled to a direct verdict of acquittal nor has he articulated grounds entitling him to a new trial.

Accordingly, the judgment of the Trigg Circuit Court is affirmed.

ALL CONCUR.

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